COBRAIN HOLDINGS SDN BHD v. EXPERTISE INTERNATIONAL A&I (M) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL SUIT NO: 22C-16-04-2015]
29 MAY 2015

BANKING: *Guarantee and indemnity – Performance guarantee – Call on bank guarantee – Injunctive reliefs to prevent call on guarantees – Whether plaintiff established prima facie case of unconscionability – Whether plaintiff satisfied 'seriously arguable and realistic inference test'*

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Application to prevent call on bank guarantees – Whether plaintiff established prima facie case of unconscionability – Whether plaintiff satisfied 'seriously arguable and realistic inference test'*

CIVIL PROCEDURE: *Injunction – Erinford injunction – Application pending appeal – Whether appeal would be rendered nugatory if injunction not ordered – Whether there was urgency and reason to grant injunction*

The first defendant was awarded a contract by the second defendant ('FELDA') to develop a housing project pursuant to a letter of appointment dated 19 November 2013. The first defendant sub-contracted the project to the plaintiff. The plaintiff alleged that the first defendant had represented to the plaintiff that the letter of appointment was subject to the execution of a formal contract to be drawn up between the first defendant and FELDA and that the formal sub-contract between the first defendant and the plaintiff would be entered to simultaneously or shortly after the execution of the formal contract. Under the sub-contract, the first defendant was said to have agreed that it 'shall consult and involve the plaintiff at all times in the dealings and negotiations for the drafting, vetting and finalisation of the terms of the formal contract' and that the first defendant 'shall obtain the written approval of the plaintiff for the execution of the same'. The plaintiff thereafter arranged a bank guarantee ('BG') to be issued in the first defendant's name in favour of FELDA. The BG was required under the first defendant's letter of appointment with FELDA. In return, the plaintiff shall be entitled to all payments by FELDA to the first defendant made under the formal contract without any claim and/or set-off whatsoever. At the end of 2014, the plaintiff discovered that the first defendant was wound-up and that the first defendant had yet to enter into a formal contract with FELDA. It was also discovered that due to its insolvency, FELDA had terminated the first defendant's appointment and sent a notice to the third defendant, OCBC Bank ('the bank') calling on the BG. Hence, the present application by the plaintiff for an interim injunction to restrain FELDA from receiving monies under the performance bond issued by the bank ('encl. 3'). The plaintiff

A contended that the BG was no longer good and unenforceable against the plaintiff and/or the bank as it was issued pursuant to the plaintiff's letter of appointment. Since the letter had been terminated, the BG ought to be revoked and cancelled. The plaintiff alleged that FELDA was not entitled to call on the BG as no formal contract had been signed between the first B defendant and FELDA, there were no provisions under the letter of award to allow FELDA to call on the BG, the first defendant had been wound up and that FELDA should be proving its debt with the OR and not calling on the BG.

Held (dismissing application in encl. 3 with costs; allowing application for C ***Erinford*-type injunction):**

(1) Bank guarantees are in substance and effect, performance bonds intended to secure performance of the underlying contract between the parties. Generally, the guarantees and performance bonds are irrevocable and on demand with unconditional contractual obligations. Hence, a more D restrained and strict exercise of discretion is advocated where injunctive reliefs are sought to prevent the demands or calls on such guarantees. The case for an interim injunction restraining a call or the receipt of monies under the guarantee would require the plaintiff to satisfy the 'seriously arguable and realistic inference test'. (paras 24, 25 & 28)

E

(2) In the present case, aside from the fact that the bank guarantee was to be honoured upon demand by FELDA, as is the convention and practice in the construction industry, the undertaking or solemn promise to pay which rests on trustworthiness, must be honoured. (para 32)

F **(3)** Although the plaintiff contended that the call and realisation of the BG would run afoul of s. 293 and s. 298 of the Companies Act 1965 read with s. 53 of the Bankruptcy Act 1967, the provisions of law was only concerned with the bank and not the first defendant. The BG was a separate document of contract between the bank and FELDA. The G plaintiff was clearly not a contracting party to the formal contract, or even to the letter of appointment. The plaintiff was thus seeking to restrain FELDA's enforcement or reliance of the formal contract in the capacity of a stranger insofar as the contract was concerned. (paras 35-38)

H **(4)** The present application did not concern the contracting parties to the main contract or the sub-contract. The plaintiff's primary complaint was not with the contracting party *ie*, the first defendant. FELDA was brought in on a case of conspiracy to do an unconscionable act; that act being to draw or enter into a formal contract without consulting the I plaintiff as the first defendant was contractually obliged to do so under its terms of contract with the plaintiff. There were no direct or express allegations that FELDA knew of the terms and conditions of the sub-

contract or that the first defendant was at least aware of the particular obligation. Hence, the plaintiff had not met the high threshold of establishing a strong *prima facie* case of unconscionability for a grant of an interlocutory injunction, especially against FELDA. (paras 39 & 46)

(5) The plaintiff had not made out a seriously arguable case and the only realistic inference was the existence of fraud, unconscionability and conspiracy in the terms alleged by the plaintiff, such that an interlocutory injunction in the terms sought by the plaintiff ought to be granted. Although there were concerns over some of the conduct, nothing of such a degree or extent as to 'prick the conscience of a reasonable and sensible man' that a case of unconscionability had been made to warrant grant of injunction to prevent injustice. (para 47)

(6) While the application for an interim injunction to restrain a call on the BG or to receive the benefits under the BG has already been dismissed, the court always retains jurisdiction and power on the matter of stay or, in suitable cases a grant of *Erinford*-type injunction. If there was no injunction ordered pending the appeal, the call made by FELDA would have to be abided by and met by the bank and the appeal would be rendered academic and nugatory. Therefore, in the interests of justice, there was greater urgency and reason to grant the *Erinford*-type injunction. (para 56)

Case(s) referred to:

Bina Jaya Mantap Sdn Bhd v. Institute of Technology Petronas Sdn Bhd [2014] 1 LNS 239 HC ***(refd)***

Bocotra Construction Pte Ltd & Ors v. Attorney General (No 2) [1995] 2 SLR 733 ***(refd)***

Edward Owen Engineering Ltd v. Barclays Bank International Ltd [1978] 1 QB 159 ***(refd)***

Erinford Properties Ltd v. Cheshire County Council [1974] 2 AII ER 448 ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor [2009] 1 LNS 913 HC ***(refd)***

IE Contractors Ltd v. Lloyds Bank Plc [1990] 2 Lloyd's Rep 496 ***(refd)***

Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442 CA ***(refd)***

R D Harbottle (Mercantile) Ltd v. National Westminster Bank [1978] QB 146 ***(refd)***

Sato Kogyo (M) Sdn Bhd v. Salini Malaysia Sdn Bhd [2013] 1 LNS 1114 HC ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***

Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401 FC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 53

Companies Act 1965, ss. 226(3), 293, 298

Rules of Court 2012, O. 28 r. 12

For the plaintiff - Abdullah Khubayb (Shahir Ab Razak with him); M/s Shahir Khubayb & Co
For the 2nd defendant - Karlos Israphil Bendlin; M/s Amin-Karlos
For the 3rd defendant - Izzan Ahmad Zairee; M/s Shook Lin & Bok

Reported by S Barathi

JUDGMENT

Mary Lim J:

Introduction

[1] This is an application for an interim injunction to restrain the second defendant from receiving monies under the performance bond issued by the third defendant (encl. 3). The injunction is to hold till the hearing of the substantive matters which initially were raised by way of an originating summons. The court has however converted the originating summons into a writ pursuant to O. 28 r. 12 of the Rules of Court 2012 as there were obvious substantial dispute on the facts. The parties were also directed to file fresh statement of claim and defences in place of the affidavits filed. These matters are being attended to presently.

Material Facts

[2] The first defendant was awarded a contract by the second defendant to develop a project known as "Perumahan Generasi Baharu Felda" (PGBF) using IBS system package (C2-1) at Felda Bukit Sagu 1, Wilayah Kuantan, Pahang. By letter dated 28 January 2014, the first defendant sub-contracted the said project to the plaintiff (said sub-contract).

[3] In his affidavit in support of the application, Tan Seah Lim @ Tan Swee Lim, the managing director of the plaintiff, *inter alia,* claims that at all material times, the first defendant represented to the plaintiff that it had been appointed by the second defendant as the main contractor *vide* letter of appointment dated 19 November 2013 (letter of appointment). It also claimed that this letter was subject to the execution of a formal contract to be drawn up between the first and second defendants. At all times, the first defendant is said to have consistently made representations and assured the plaintiff that the formal contract was "going to be executed immediately and that the formal sub-contract between the first defendant and the plaintiff would then be entered into simultaneously or shortly after the execution of the formal contract".

[4] Under the said sub-contract, the first defendant is said to have agreed that it "shall consult and involve the plaintiff at all times in the dealings and negotiations for the drafting, vetting and finalisation of the terms of the formal contract" and that the first defendant "shall obtain the written approval of the plaintiff for the execution of the same". The plaintiff arranged

a bank guarantee to be issued in the first defendant's name for the sum of RM1,672,500 in favour of the second defendant. This bank guarantee is required under the first defendant's letter of appointment with the second defendant. In return, the plaintiff shall be entitled to all payments by the second defendant to the first defendant made under the formal contract without any claim and/or set-off whatsoever.

[5] The plaintiff was also to pay the first defendant a sum of RM3.45 million. The plaintiff says it has paid the first defendant RM500,000 on 28 January 2014; another RM500,000 within the final week of February 2014; and the balance of RM2,450,000 in monthly instalments of RM222,000 from February 2014 to November 2014; and the final instalment of RM230,000 to be paid in December 2014.

[6] In relation to the bank guarantee (BG), the plaintiff and the first defendant further agreed that the first defendant was to open a designated collection account (DCA) controlled solely by the third defendant for the purpose of channelling all proceeds of the main contract. All monies in that DCA was to be credited into the plaintiff's designated collection account (PDCA). Thereafter, the monies were to be utilised in a particular manner: 10% of each contract proceeds or RM222,000 whichever is lower to be deposited with the DCA for each consecutive month until November 2014. Subsequently, 10% of the contract proceeds or RM230,000 was to be paid on December 2014. The balance was then to be credited into the PDCA.

[7] The plaintiff claims that there are monies totalling RM8,656,525.08 due for various reasons. First, because it had completed 25.95% of the works, a total amount of RM1,931,449.83 under Progress Payment Certificate No. 6 and RM1,428,765.85 under Progress Payment Certificate No. 5 remains outstanding. Then, there is a further sum of RM4,396,309.40 outstanding for variation order works which have been submitted but have yet to be certified. Finally, there is a sum of RM900,000 due under progress works which have been submitted but have yet to be certified.

[8] At the end of 2014, the plaintiff made several discoveries. First, it discovered that the first defendant was wound-up on 17 November 2014. Second, it discovered that despite the assurances and representations made by the first defendant to the plaintiff, the first defendant had yet to enter into a formal contract with the second defendant – see para. 6.12 of the statement of claim. The plaintiff claimed that the parties had agreed that in the event the first defendant fails to execute the formal agreement with the second defendant and/or the project cannot be completed for any reason whatsoever, the first defendant "shall refund all sums paid by the plaintiff pursuant to the plaintiff's letter of appointment".

[9] Consequent to these discoveries, the plaintiff has demanded a refund of the monies paid but that has proved unsuccessful. Then, there is the plaintiff's third discovery, that because of its insolvency, the second

A defendant terminated the first defendant's appointment under the letter of award on 2 March 2015. The notice of termination that is exhibited states that the termination is pursuant to cl. 60.2 of the "syarat-syarat perjanjian" – see exh. "ET-8". With the termination, the second defendant has ordered the first defendant to vacate the site immediately.

B **[10]** Then, the last discovery; at 8.30pm of 25 March 2015, the plaintiff received a call from the third defendant's regional manager that the third defendant has received a notice from the second defendant calling on the bank guarantee. Hence, the application.

C **Basis Of Application**

[11] The first defendant is represented by the official receiver. Although the OR attended earlier, the OR was absent in these proceedings. For the record, although the originating summons and now writ of summons is against three defendants, namely the first defendant, the second defendant and the third defendant bank who provided the BG, the application for injunction is only against the second and third defendants. I understand the OR is kept informed by the plaintiff, as advised by the plaintiff's learned counsel.

[12] Affidavits have been filed by the plaintiff and the second defendant. None were filed by the first or third defendant; the latter having no objection to the application filed by the plaintiff.

[13] For the record too, simultaneous proceedings were initiated in the winding-up court by the plaintiff for the purpose of procuring the necessary leave under sub-s. 226(3) of the Companies Act 1965. Leave was given.

[14] In making its case for an interlocutory injunction in the terms found at prayers (i) to (ii), the plaintiff starts with allegations against the first defendant, with whom the plaintiff has a contractual relationship but which for reasons best known to the plaintiff, it has chosen not to include the first defendant in these present proceedings. Instead, the application for an interim injunction is only sought against the second and third defendants.

[15] The plaintiff alleged that there is unconscionable conduct on the part of the first defendant. Acting on the faith and truth of the first defendant's representations and warranties as pointed out earlier, the plaintiff had duly paid the first defendant RM3.45 million, completed timeously and at its own cost and expense, the current works for the project, and, arranged for the BG. The plaintiff claimed that each of the representations made by the first defendant is untrue and that no attempts had been made by the first defendant to enter into the formal contract and that none had been entered till to date. The plaintiff alleged that the representations were therefore misrepresentations, that the first defendant had no intention or could not possibly believe that they would be appointed as the main contractor to complete the project in view of the true state of affairs of the first defendant;

that there was active concealment of the matters that the plaintiff has now discovered; that the first defendant had not carried on in its business in the ordinary course or maintained it as a going concern.

[16] In respect of the second defendant, the plaintiff also alleged that there has been unconscionability in its call on the BG. The plaintiff alleged that at all material times, the second defendant knew that the BG was issued by the plaintiff but in the first defendant's name, issued pursuant to the letter of appointment, and that the second defendant knew or was aware that any call that it makes on the BG will affect and impact the plaintiff financially and not the first defendant.

[17] The plaintiff claimed that the BG is no longer good and unenforceable against the plaintiff and/or the third defendant as it was issued pursuant to the plaintiff's letter of appointment. Since that letter has been terminated, the BG ought to be revoked and cancelled. Further, the plaintiff alleged that the second defendant is not entitled to call on the BG as no formal contract had been signed between the first and second defendants and that there were no provisions under the letter of award to allow the second defendant to call on the same.

[18] It is the plaintiff's case that the second defendant is not entitled to call on the BG because the first defendant has been wound up and that the second defendant should be proving its debt with the OR; and not calling on the BG. Following the termination, the second defendant is said to have on 12 March 2015, instructed the first defendant to remove materials from the site. Those materials were materials which were either "yang masih belum dipasang/dibayar oleh pihak Felda". The second defendant wanted the first defendant to remove the materials as it "tidak akan bertanggungjawab di atas sebarang kerosakan dan kehilangan ke atas item/material tersebut" – see exh. "ET-9".

[19] The plaintiff also claims that the termination of the first defendant and thereby the call on the BG was supposedly based on a formal contract entered into between the first and second defendants. The plaintiff maintains that the "formal contract" relied on by the first defendant for this purpose could not be valid because on the date relied on which is 13 February 2015, the first defendant had already been wound-up (it was wound-up on 17 November 2014). Further, as informed by Haji Abdul Hamid Mahuddin who signed on behalf of the first defendant, he "was made to sign the formal contract in a mamak restaurant on 6 March 2015 at around 2pm to 2.30pm nearby Giant Hypermarket, Kelana Jaya, although at the material time he had no capacity to execute the same"; giving all indications that the formal contract was signed recently, and backdated.

[20] In response, the second defendant claims that the signing of the formal contract was attended to by AS2 Consult Sdn Bhd, the quantity surveyor and consultant project manager appointed by the first defendant for the project.

All the second defendant did was received copies of the contracts from AS2 Consult. In support, the second defendant relies on a letter dated 10 April 2014 from AS2 Consult to Felda Engineering Services Sdn Bhd, the project manager.

[21] The second defendant also claims to have no knowledge of any arrangements between the plaintiff and the first defendant. As far as the second defendant is concerned, the works under the works contract were carried out by the first defendant and not the plaintiff; that only RM3,360,215.68 was outstanding under Certificates of Payments Nos. 5 and 6; that there were no variation works instructed or done; that the last claim was in relation to Payment Certificate No. 6 dated 10 December 2014; and that no claims were submitted after that last certificate. The Insolvency Office has since given the green light for the payments under these two certificates to be paid into the designated accounts and/or the third defendant.

[22] The second defendant claimed that contrary to the plaintiff's allegations, a formal contract was entered into between the first and second defendants on 19 November 2013. The JKR standard form contract was used. Its counsel accepts that the formal contract was signed this year, in February or March 2015 but backdated 2015. That, however, did not mean that there is ground or basis of any unconscionability on the part of the second defendant, or conspiracy, as alleged.

Determination

[23] There are several fundamental principles that must be borne in mind when dealing with bank guarantees and performance bonds.

[24] First, as expressed earlier in the decisions of *Sato Kogyo (M) Sdn Bhd v. Salini Malaysia Sdn Bhd* [2013] 1 LNS 1114; [2014] 10 MLJ 614 and *Bina Jaya Mantap Sdn Bhd v. Institute of Technology Petronas Sdn Bhd* [2014] 1 LNS 239; [2014] 11 MLJ 352, bank guarantees are in substance and effect, performance bonds intended to secure performance of the underlying contract between the parties. These bank guarantees are intended to be honoured without fuss or question and upon presentation of documents as opposed to arguments or meeting some threshold which is merit based. This was recognised by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401; [2012] 4 MLJ 1 and *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; [1995] 1 MLJ 149, endorsing the general approach adopted in other jurisdictions as seen in the cases of *R D Harbottle (Mercantile) Ltd v. National Westminster Bank* [1978] QB 146, *IE Contractors Ltd v. Lloyd's Bank plc* [1990] 2 Lloyds Rep 496, *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] 1 QB 159, and *Bocotra Construction Pte Ltd & Ors v. Attorney General (No 2)* [1995] 2 SLR 733. Similar sentiments can be found in the Court of Appeal's decision in *Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442.

[25] Generally, these guarantees and performance bonds are irrevocable and on demand with unconditional contractual obligations. Such guarantees further enjoy "a bias or (rebuttable) presumption in favour of construction which holds a performance bond to be conditioned upon documents rather than facts" as Staughton LJ expressed in *IE Contractors Ltd v. Lloyds Bank plc* [1990] 2 Lloyd's Rep 496. A more restrained and strict exercise of discretion is therefore advocated where injunctive reliefs are sought to prevent the demands or calls on such guarantees. The grant of any injunctive orders should be in the exceptional case and not as a matter of course.

[26] Another point that warrants mention is the identity of the warring parties in court; and whether the application for an injunctive relief is as against the issuing bank or, against the beneficiary of the guarantee. Where the application is against the issuer or bank, it must be borne in mind that the bank guarantee or guarantee agreement is separate from the underlying contract between the parties. That being the case, the court should not examine the question of breach or otherwise of the underlying contract. The bank is obliged to pay the beneficiary without proof or conditions despite protests or objections from any party.

[27] Where the application is against the beneficiary or the party who has called on the guarantee, the underlying contract will come under scrutiny for the purpose of establishing the existence or otherwise of cogent reasons or grounds for the injunction to apply. This was expressed by the Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442. Those reasons or grounds are restricted to cases where the presence of fraud or unconscionability is proved.

[28] At the interlocutory level and it appears that it is in order to strike a balance between commercial efficacy and the real, genuine cases, the case for an interim injunction restraining a call or the receipt of monies under the guarantee would require the plaintiff to satisfy the "seriously arguable and realistic inference test" as expressed in *Focal Asia Sdn Bhd & Anor v Raja Noraini Raja Datuk Nong Chik & Anor* [2009] 1 LNS 913 which was adopted by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd* as the "equally applicable to the extended exception of unconscionability".

[29] In *Focal Asia*, Mohamad Ariff J (as he then was) had opined that:

> If there is clear evidence of fraud in the underlying contract, or unconscionability, the Court can interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of 'seriously arguable that the only realistic inference is fraud' as good law in an interlocutory application such as the present.

[30] The Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd* had also agreed with this same test as suggested by the learned High Court; and that is:

> ... the Plaintiff has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of fraud or unconscionability which would basically mean establishing a strong *prima facie* case, at least at the interlocutory stage. The plaintiff has to place sufficient evidence before the Court so as to enable the Court to be satisfied, not necessarily beyond reasonable doubt, that a case of "unconscionability" being committed by the beneficiary has been established to an extent sufficient for the Court to be minded to order the injunction sought. This additional ground should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

[31] The Court of Appeal was of the view that "there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare statement". Her Ladyship, Zainun Ali JCA (as Her Ladyship then was) explained that:

> [4] ... unconscionability is a doctrine which allows the courts to deny enforcement of a contract because of abuses arising out of the contract.
>
> [5] In my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct and because the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances.

[32] In the instant case, aside from the fact that the bank guarantee is to be honoured upon demand by the second defendant, as is the convention and practice in the construction industry, the undertaking or solemn promise to pay which rests on trustworthiness, must be honoured. The court is advised by the learned counsel for the third defendant however, that the third defendant has however, no objections to the plaintiff's application.

[33] The plaintiff is attempting to establish a strong *prima facie* case of the existence of fraud, unconscionability and conspiracy in the terms alleged by the plaintiff. To that end, the plaintiff needs to place "... before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare statement". The court must then weigh those pieces of evidence against the other facts placed by the second defendant to see if indeed on a totality of all these facts, the "events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man". If that conscience is pricked and there is a lingering doubt, then it may be said that the plaintiff has met the standard of a seriously arguable case that the only realistic inference from the facts, circumstances and arguments put forth by its learned counsel is the existence of fraud, unconscionability and conspiracy in the terms alleged by the plaintiff.

[34] The following are the principal 'facts' or matters which the plaintiff has placed before the court:

(i) existence of a main contract between the first and second defendants

(ii) existence of a sub-contract between itself and the first defendant

(iii) the requirement for a formal contract for both the main contract and the sub-contract

(iv) the requirement of keeping the plaintiff consulted before the formal contract is concluded with the second defendant

(v) the provision of a bank guarantee

(vi) the payment of consideration of RM3.45 million to the first defendant

(vii) the agreement of the first defendant to repay all benefits received in the event of non-execution of a formal main contract or formal sub-contract

(viii) the winding up of the first defendant

(ix) the termination of the first defendant on the ground of the first defendant's insolvency

(x) the statutory declaration of Haji Abdul Hamid Mahuddin

(xi) the existence of a formal main contract signed in 2015 which is backdated to 2014

[35] Dealing first with the plaintiff's contention that the call and realisation of the bank guarantee would run afoul of ss. 293 and 298 of the Companies Act 1965 read with s. 53 of the Bankruptcy Act 1967. The plaintiff claims that the realisation of the bank guarantee would unduly prefer the second defendant over the other creditors of the first defendant and this would offend s. 293. Further, since the bank guarantee was issued in April of 2014, it is invalid as was issued within six months of the date of the winding-up petition in which case, the second defendant is prohibited from receiving the monies under s. 298 of the Companies Act 1965.

[36] In this respect, I must agree with learned counsel for the second defendant. These provisions of the law concern the third defendant and not the first defendant. It is where the party against whom the bank guarantee is sought to be enforced, that is the bank, is bankrupt or wound up, as the case may be; that is the relevant consideration. It is that insolvent individual or company's assets which comes under the scrutiny and purview of the Companies Act 1965 or the Bankruptcy Act; not others.

[37] Further, as reminded earlier, the bank guarantee is a separate document of contract between the third defendant bank and the second defendant. It may have been caused to be issued by the plaintiff and/or the

A first defendant but it does not detract from the fact that the bank guarantee now before the court and which lies at the heart of the parties' concerns; is a contract between the second and third defendants. This brings to the fore a very critical point and that concerns the parties before the court and the orders sought in respect of these parties.

B **[38]** The plaintiff is seeking to restrain the second defendant's enforcement or reliance of the formal contract. It is seeking in the capacity of a stranger insofar as that contract is concerned as it is clearly not a contracting party to that formal contract; or even to the letter of appointment. The plaintiff may have caused to arrange the bank guarantee in the manner and terms that C it claims. That, however, does not detract from the plain fact that it remains nevertheless a stranger to those arrangements. There is no evidence, be it in correspondence or meeting records to show the presence of the plaintiff; or even attributable to the plaintiff, that is known to the second defendant or may be said to be known to the second defendant.

D **[39]** The next point to note is that the present application does not concern the contracting parties to the main contract, or the sub-contract. Although the plaintiff may have referred to these contracts, the plaintiff's primary complaint is not with its contracting party, the first defendant. The second defendant is brought in on a case of conspiracy to do an unconscionable act; E that act being to draw or enter into a formal contract without consulting the plaintiff as the first defendant was contractually obliged to do so under its terms of contract with the plaintiff. There are no direct or express allegations that the second defendant knew of the terms and conditions of the sub-contract or that the first defendant was at least aware of this particular F obligation.

[40] The affidavit seems to infer that the second defendant must have known but went ahead nevertheless to enter into this formal contract without involving the plaintiff. Worse, when the second defendant wanted to terminate the first defendant on ground of the first defendant's insolvency, G the plaintiff said that the second defendant knew that it could not because there were no terms to that effect. Hence, the formal contract was signed and backdated. For all these reasons, the plaintiff only seeks orders against the second defendant; and of course, the third defendant in its interlocutory application.

H **[41]** The plaintiff claims that it had no knowledge of this formal contract until just recently. Without dwelling or delving into the truth of the substantive case between the parties, the court finds that the plaintiff has actually acted on and relied on the terms of the main contract. This has not been disclosed by the plaintiff anywhere in any of its affidavits.

I **[42]** From my careful and anxious examination of all the documents filed, it is noted that the plaintiff has itself relied on the terms and conditions in this so-called 'formal contract' – see exh. 'ET-11'. In this letter dated 3 April

2015 to the first defendant, the plaintiff (through its project director) is seen clearly advising or reminding the first defendant to include certain claims available under cls. 63.1(b) and 63.1(d) of the main contract. In order to be able to do that, I can only conclude that the plaintiff was relying on the same formal contract that the plaintiff now claims to have no knowledge of. It is to be noted that the reference to the main contract is unreserved and unqualified.

[43] Further, my examination of the documents does not reveal any mention of the plaintiff, be it in the site meetings or any correspondence between the first and second defendants. The presence of the plaintiff has been kept almost exclusively to the dealings between the plaintiff and the first defendant or between the plaintiff and the third defendant. There is not a single document in the numerous documents presently before the court that points to the plaintiff's involvement in the project and which is known or condone by the second defendant.

[44] I must add an observation. In its affidavit filed in support of the application for an interlocutory injunction, the plaintiff claimed that it had only since learnt of the termination of the formal contract. The affidavit filed in support was deposed on 25 March 2015. Despite just learning of the existence of the formal contract, the plaintiff was quite contented to rely on that formal contract. In its letter dated 3 April 2015 to the first defendant (and this letter is produced by the plaintiff), the plaintiff's project manager, advised and reminded the first defendant to make its claims under particular clauses of the formal contract following the termination of the works contract. The plaintiff also offered additional documents to assist the first defendant in making its claim with the second defendant. Those documents comprise as-built drawings; DOs and invoices.

[45] The plaintiff did not protest the existence or condition of the formal contract, that such a formal contract had been made without alerting the plaintiff or that the plaintiff was in breach for having entered into such a formal contract as far back as 19 November 2013 without obtaining its written approval; or without simultaneously entering into formal sub-contract with the plaintiff. If the existence of the formal contract, whether dated as far back as 19 November 2013 or even recently in March or April of this year, did not appear to matter or affect the plaintiff then at the time of the writing of this letter, it is difficult to see how the plaintiff can now make the present allegations or say that the existence of the formal contract is of real consequence or effect to the plaintiff. The plaintiff has not displayed consistent conduct in this regard. Having itself relied on that formal contract, it is highly inappropriate for the plaintiff to now argue elements of unconscionability, especially against the second defendant.

[46] Under such circumstances, and on a totality of the evidence and facts before the court, I am in serious doubt if the plaintiff has met the high standards required. On the contrary, I find that the plaintiff has not met the

high threshold of establishing a strong *prima facie* case of unconscionability for a grant of an interlocutory injunction, especially against the second defendant. The plaintiff's arrangements remain very much as arrangements between itself and the first defendant and, for the plaintiff to raise its present complaints with the first defendant. Yet, it has not. It has not even enjoined the first defendant for the present proceedings; and no explanation is offered.

[47] I cannot find and I certainly, cannot safely say that the facts alleged by the plaintiff, even at its highest, show that there is a seriously arguable case made out by the plaintiff, that the only realistic inference is the existence of fraud, unconscionability and conspiracy in the terms alleged by the plaintiff, such that an interlocutory injunction in the terms sought by the plaintiff ought to be granted. There are concerns over some of the conduct, but nothing earth shattering or of such a degree or extent as to "prick the conscience of a reasonable and sensible man" that a case of unconscionability has been made and that the injunction must be granted to prevent injustice.

[48] In the circumstances, the application in encl. 3 is dismissed with costs of RM10,000 to second defendant.

[49] After the above order was made, learned counsel advised the court that he had instructions to appeal against the above decision. He then orally applied for an Erinford injunction (*Erinford Properties Ltd v. Cheshire County Council* [1974] 2 AII ER 448) which the plaintiff subsequently reconsidered and decided to pursue by way of a written application (encl. 15). This part of the judgment pertains to the application for an Erinford or Erinford-type injunction found at encl. 15. The affidavit in support is at encl. 17. All parties have been served; the second defendant objects to the grant of such an injunction while the third defendant does not. The parties have also filed intentions to rely on their earlier affidavits.

[50] In substance, the plaintiff's present application is for an order restraining the second defendant from receiving and/or dealing with monies or any part of the monies under the BG; and restraining the third defendant from complying with any demand to call on the BG, until the disposal of the plaintiff's appeal against this court's dismissal for an issuance of an interlocutory injunction. The plaintiff has filed a notice of appeal on 25 May 2015 to the Court of Appeal.

[51] After going through the same background facts and reasons why the interlocutory injunction ought to be granted, learned counsel for the plaintiff submitted that if the Erinford injunction was not granted, the third defendant would release the monies under the BG to the second defendant as the second defendant had already called on the BG. That would render the plaintiff's appeal nugatory. Further, the plaintiff contended that the balance of convenience tilted in the plaintiff's favour as damages would not provide adequate relief for the plaintiff. The plaintiff claims that if the call on the BG was not restrained, the plaintiff's various other facilities with other banks

(some 29 of them) would be affected; and that as far as the works contract is concerned, that the plaintiff had in some way defaulted on its performance. It was therefore urged upon the court to maintain status quo until the disposal of the appeal before the Court of Appeal.

[52] The second defendant contended otherwise. Learned counsel argued that there was no material placed before the court to demonstrate how the appeal will be rendered nugatory. The mere fact that monies will be released or received by the second defendant will not render the appeal nugatory. The appeal against the refusal of the interlocutory injunction could still be pursued and in the event the appeal is allowed; that the injunction ought to have been granted, all that would mean is that the second defendant would repay the monies already received under the BG. There is no evidence or suggestion that the second defendant is not in a position to return any monies received under the BG. If that was so or if, despite winning the appeal, the plaintiff could not be placed in the same position as if no call was made, that perhaps, may come within the meaning of nugatoriness of the appeal.

[53] As for the 29 other facilities; learned counsel submitted that the plaintiff's concerns were bare statements and speculative at best since no evidence was produced. In any case, it was suggested that the present call was not a cross-default such that an event of default could be said to have occurred for the other facilities to be adversely affected.

[54] After hearing all parties, I granted the order. The second defendant has now filed an appeal against that grant of an Erinford-type of injunction.

[55] The legal principles for such an order are settled in the Federal Court decision of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1. The test being that "when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory".

[56] It cannot be denied that while the application for an interim injunction to restrain a call on the BG or to receive the benefits under the BG has already been dismissed, the court always retains jurisdiction and power on the matter of stay or, in suitable cases, a grant of what is known as an Erinford-type of injunction. The plaintiff here has submitted that the appeal will be rendered nugatory because of the matters mentioned in paras. 7 and 10 of the affidavit filed in support. At para. 7, the plaintiff claims that the appeal will be rendered nugatory because the monies would be released by the third defendant to meet the call by the second defendant. As for para. 10, the plaintiff claims that it will be prejudiced by the refusal to grant the injunction because damages will not be adequate. The plaintiff's 29 other banking facilities will also be affected if the BG is paid up.

[57] Although the consequence of a call may be in the terms and extent as described by the plaintiff, and it may well have been aware or taken to have been aware and agreed to such consequences when providing the BG in the

first place, that does not necessarily mean that where the plaintiff has failed to secure an interlocutory injunction to stop such a call, an Erinford injunction cannot now be ordered; and that the plaintiff must simply wait till the appeal is resolved. The second defendant has argued that the appeal can still proceed but the second defendant must be allowed to proceed with the call and the third defendant to pay against the call. If the plaintiff succeeds, the second defendant will just refund any or all monies received; and it is financially sound to make such refunds.

[58] With respect, the court disagrees.

[59] The matters that lie at the heart of the interlocutory application and the substantive issues in the writ relate substantively to the same complaints; that there is unconscionability and conspiracy on the part of the first and second defendants in the manner already detailed above such that the second defendant's reliance and call on the BG is unconscionable and must be restrained. The whole object of the application and the writ is really the same and that is to restrain the call and/or the execution of such a call, if one has already been made; and that is what has happened here. That application has been refused. It is obvious that by the time the appeal against that refusal is heard, if there is no injunction ordered pending appeal, the call already made by the second defendant will have to be abided by and met by the third defendant. The focus of the injunction is on the call and the execution of the call; and not on the repayment. The appeal will certainly, in those circumstances be rendered academic and nugatory.

[60] Furthermore, in the interests of justice and balancing the additional facts that the hearing of the substantive case has already been fixed for 12 August 2015; and that the BG is valid until 2017, there is greater urgency and reason to grant the Erinford-type injunction in the present facts.

[61] The court will therefore grant the orders sought in prayers (1) and (2) till the hearing of the substantive case before the High Court or the appeal by the Court of Appeal on the plaintiff's appeal in relation to the dismissal of encl. 3, whichever is earlier; on the undertaking as given by the plaintiff; with liberty to apply and with no order as to costs. The plaintiff is further directed to take all necessary and appropriate action to expedite the appeal.